Supreme Court, U.S.
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No. 03 1416

IN THE

Supreme Court of the United States

JERRY ALLEN RUNNINGEN,
Petitioner,

versus

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Kentucky State Police obtained a search warrant to search the Petitioner's home and an essential part of the information obtained for the affidavit for the search warrant was obtained as a result of an illegal stop of another person.

1. If the Government violates someone's constitutional rights to obtain a search warrant to search your home (castle) and thereby violates your constitutional rights, does not the exclusionary rule apply?

2. Did the Petitioner have standing to contest the search of his home under the particular facts and circumstances of this case? The particular facts and circumstances being that as the result of an illegal stop of another person the police were able to obtain information that was placed in an affidavit and used to obtain a search warrant to search the Petitioner's home, thus leading to the most important question being:

3. If a person's home is searched with a search warrant that is obtained as a result of the violation of constitutional rights of another, doesn't the person whose privacy has been violated have standing to contest the validity of the search warrant?

LIST OF PARTIES

The caption of the case provides the names of all the parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jerry Allen Runningen, respectfully prays that a Writ of Certiorari issue to review the order of the Kentucky Supreme Court denying discretionary review of a decision of the Court of Appeals of the Commonwealth of Kentucky which affirmed a opinion of the Larue Circuit Court of the Commonwealth of Kentucky.

STATEMENT OF JURISDICTION

And Opinion and Orders Below:

On January 14, 2004, the Supreme Court of Kentucky, case number 03-SC-134-D, denied discretionary review of the decision of the Kentucky Court of Appeals. A copy of that order is attached hereunto as Appendix A. On December 13, 2002, the Commonwealth of Kentucky Court of Appeals, case number 02-CA-0004-MR, affirmed the order of the Larue Circuit Court of Kentucky. A copy of that order is attached hereunto as Appendix B. On January 22, 2003, the Court of Appeals denied a Petition for Rehearing. A copy of that order is attached hereunto as Appendix C. On August 14, 2001, the Larue Circuit Court, Honorable Larry Raikes presiding, entered his Findings of Fact. Conclusions of Law and Order. On September 27, 2001, the Larue Circuit Court entered an order overruling motions to alter, amend or vacate the order of August 14, 2001. (None of the Orders and Opinions were published in any official reporter).

The jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. 1257(3) and rule 13(1) *et seq.* of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution, provides:

ARTICLE IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *(Adopted 1791).*

STATEMENT OF THE CASE

Introduction

The Kentucky State Police illegally stopped another person and as a result of that stop, obtained information that was placed in an affidavit which was utilized to obtain a search warrant that was used to ultimately search the Petitioner's home. The material facts are as follows:

A. Material Facts

On the 28th day of July, 2000, Hon. James E. Bondurant, Judge of Larue District Court, issued a search warrant for the Petitioner's home, based upon the following Affidavit:

> On the 27th day of July, 2000, at approximately 1900 p.m. Affiant received information from/observed: **On June 24, 2000 this** officer met with persons he knew to be reliable, Jones and Underwood, who stated that Runningen on Wunderland Rd. was **growing marijuana**. They also provided this officer with a list of names they believed to be trafficking marijuana and other controlled substances. On June 30, 2000 this officer arrested two of the subjects on this list provided to him by Jones and Underwood for four

> separate felony counts of possession of narcotics. On July 27, 2000 this officer listened to an **anonymous caller** that called Post 4, E-town, KSP, to report that Dennis Asbell was at 2327 Wunderland Rd., at a Jerry Runningen residence purchasing marijuana. This officer was given vehicle information as well as a destination of Asbell. Asbell was stopped pulling from Wunderland Rd. and arrested for possession of marijuana.
>
> Acting on the information received, affiant conducted the following independent investigation: **Jerry Runningen resides at 2327 Wunderland Rd., Upton, KY 42784. This was corroborated by a operators license check. Jerry Runningen has a 1949 Harley Davidson, black, and a 1981 Honda 4-dr, grey that are registered to him. This was corroborated by a vehicle check. Jerry Runningen has no criminal history pertaining to controlled substances or marijuana trafficking/possession.** (Emphasis, ours) (See Appendix F).

As this Court can obviously see, this search warrant was issued, and the Petitioner's house was searched based upon the stop of one Dennis Asbell. Asbell himself was arrested and charged with an entirely separate crime in Hardin County, Kentucky, as a result of this information. However, Asbell was never convicted because the Hardin District Court, Hon. John Simcoe presiding, by Order entered February 1, 2001, found that the "Commonwealth did not have probable cause to initiate the traffic stop [of Mr. Asbell] for a violation of KRS 189.390(6). As a result of the illegal stop the evidence obtained as a result of the stop is suppressed." (See Order of Hardin District Court entered February 1, 2001, Appendix G).

As one can see, the ultimate issuance of the search warrant was based upon reliance upon an affidavit that contained information that resulted from the illegal stop and seizure of one Dennis Asbell. Since the Dennis Asbell

citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

III. Iowa Code § 99F.11.

A tax is imposed on the adjusted gross receipts received annually from gambling games authorized by the chapter at a rate of five percent on the first one million dollars of adjusted gross receipts, at a rate of ten percent on the next two million dollars of adjusted gross receipts, and at a rate of twenty percent on any amount of adjusted gross receipts over three million dollars. However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent. The taxes imposed by this section shall be paid by the licensee to the treasurer of the state within ten days after the close of the day when the wagers were made and shall be distributed as follows. . . .

STATEMENT OF THE CASE

The majority decision is an "unprecedented action . . . offensive to the institutional integrity of our system of justice in this country. . . ."

Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald, 675 N.W.2d 1, 18 (Iowa 2004) (Cady, J., dissenting). (App. 48)

Petitioner seeks certiorari a second time to enforce this Court's mandate in a long-running dispute over the constitutionality of a state statute that establishes differential wagering tax rates on the revenue from slot machines at

pari-mutuel racetracks and the revenue from slot machines on riverboat casinos.[2] In a unanimous opinion this Court reversed the Iowa Supreme Court in *Fitzgerald v. Racing Ass'n of Cent. Iowa, et al.*, 123 S.Ct. at 2160 (2003), succinctly rebuffing a federal equal protection challenge by finding that several possible rational bases easily support the differential tax rate:

> [A]side from simply aiding the financial position of the riverboats, the legislators may have wanted to encourage the economic development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States. . . . Alternatively, they may have wanted to protect the reliance interests of riverboat operators, whose adjusted slot machine revenue had previously been taxed at the 20 percent rate. All these objectives are rational ones, which lower riverboat tax rates could further and which suffice to uphold the different tax rates.

Fitzgerald v. Racing Ass'n of Cent. Iowa, et al., 123 S.Ct. at 2160 (citations omitted). (App. 7) The case was reversed and remanded to the Iowa Supreme Court "for further proceedings not inconsistent with this opinion." *Id.* at 2161. (App. 8)

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[2] Iowa law imposes a graduated wagering tax rate on adjusted gross receipts in excess of three million dollars from gambling games at racetracks which began at 20 percent in 1994. In 1997 the wagering tax rate increased by 2 percent per year and would have reached 36 percent in 2004. During the same period from 1997 to 2004 the tax rate on gambling games on riverboats remained at 20 percent. *See* Iowa Code § 99F.11 (2003).

On remand, in a confrontation with the United States Supreme Court, the majority of a sharply divided Iowa Supreme Court accepted federal equal protection principles, but asserted the right to independently apply these principles and rejected as "illogical," "insufficient" and lacking support either "in the record" or in "common knowledge" the rational bases expressly found by the Court to support the differential wagering tax rates under the federal Equal Protection Clause. *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 10-14. (App. 32-45)

This constitutional showdown sparked two vigorous dissents, one that labeled the majority decision an "unprecedented action . . . offensive to the institutional integrity of our system of justice in this country. . . . ," *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 18 (Cady, J., dissenting), and the other that cautioned the majority decision had "squandered the opportunity to correct its prior decision in this case, which, for reasons pointed out by the Supreme Court, was completely outside the mainstream of equal-protection jurisprudence," *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 16 (Carter, J., dissenting). (App. 45-46, 48-49)

Because the Iowa Supreme Court continued to apply the same federal test and follow the same federal analysis as the United States Supreme Court, this "conflicting decision" by the Iowa Supreme Court, in the words of Justice Cady's dissent, "necessarily means" the Iowa Supreme Court finds the United States Supreme Court decision to be "totally and completely irrational and renders it a nullity, or at least merely advisory." *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 17-18 (Cady, J., dissenting). (App. 48)

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

On Remand the Iowa Supreme Court Violated the Mandate to Conduct "Further Proceedings Not Inconsistent With This Opinion" by Reapplying the Federal Equal Protection Standard and Rejecting as Erroneous the Specific Rational Bases Found by the United States Supreme Court to Support the State Tax Statute.

In a 5-2 split decision for the second time the Iowa Supreme Court struck down a state tax statute under the Equal Protection Clause. Upon reversal of its initial decision by the United States Supreme Court, the Iowa Supreme Court was directed to proceed on remand in a manner "not inconsistent with" the United States Supreme Court opinion. *Fitzgerald v. Racing Ass'n of Cent. Iowa, et al.*, 123 S.Ct. at 2161. (App. 8) Despite the right of the Iowa Supreme Court on remand "to fashion its own test for examining claims" brought under the Iowa Constitution, the Iowa Supreme Court declined to do so and explained that "the racetracks did not propose in their initial briefing that the test to be applied to their claim under the Iowa Constitution was any different than that applied under the federal Equal Protection Clause." *Racing Ass'n of Central Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 6. (App. 24) Rather, the Iowa Supreme Court asserted its right under the Iowa Constitution to reapply the federal principles and to reject the specific rational bases expressly found by the United States Supreme Court to support the tax differential under the Iowa statute in this case.

State and Federal Equal Protection Analysis

On remand the Iowa Supreme Court reapplied the federal principles for examining claims under the Equal Protection Clause of the Iowa Constitution. The Iowa Supreme Court noted its authority to formulate a different state law test, but explained its reason for declining to take this step:

> Despite this court's right to fashion its own test for examining claims brought under our state constitution, we do not think *this case* is the proper forum to consider an analysis that might be more compatible with Iowa's constitutional language. We decline to do so here because the racetracks did not propose in their initial briefing that the test to be applied to their claim under the Iowa Constitution was any different than that applied under the federal Equal Protection Clause. Therefore, it is prudent to delay any consideration of whether a different analysis is appropriate to a case in which this issue was thoroughly briefed and explored.

Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald, 675 N.W.2d at 5 (emphasis in original). (App. 24) Although the Iowa Supreme Court concluded the parties had waived any argument that different equal protection principles apply under the state constitution, the Court apparently concluded that parties had *not* waived the argument that the federal principles should be applied independently. There is no reasonable ground for this distinction.

The Iowa Supreme Court requires that issues be raised and ruled on in the district court in order to preserve an issue for appeal. *O'Hara v. State*, 642 N.W.2d 303, 314 (Iowa 2002) ("O'Hara . . . did not ask the court to

address the equal protection and due process issues. He therefore did not properly preserve these constitutional issues for our review."); *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999) ("[W]e require error preservation even on constitutional issues."); *Miller v. Wellman Dynamics Corp.*, 419 N.W.2d 380, 384 (Iowa 1988) ("Even issues of constitutional magnitude will not be addressed by this court if not presented in the trial court."). The parties never briefed or argued that the federal principles should be applied independently under the Equal Protection Clause of the Iowa Constitution; therefore, the Iowa Supreme Court should have been unable to reach this issue without overruling its own case law on preservation of error.[3]

Because the Iowa Supreme Court ruled that the racetracks waived any claim of independent interpretation of the Iowa Equal Protection Clause, the Iowa Supreme Court opinion fundamentally differs from those cases in which state courts have articulated different state constitutional standards on remand from a reversal on an issue of federal constitutional law. *See, e.g., Commonwealth v. Upton*, 458 N.E.2d 717 (1983), *rev'd, Massachusetts v. Upton*, 466 U.S. 727 (1984), *on remand, Massachusetts v. Upton*, 476 N.E.2d 548, 559 (1985) (state constitution determined to provide stricter standards for probable cause); *People v. Ramos*, 639 P.2d 908 (1982), *rev'd, California v. Ramos*, 463 U.S. 992 (1983), *on remand, People v. Ramos*, 689 P.2d 430, 432 (1984) (state constitution violated by Briggs instruction in penalty phase of death penalty case); *State v. Chrisman*, 619 P.2d 971 (1980),

[3] On remand, the Iowa Supreme Court denied requests for additional briefing and oral argument from the parties. (App. 9-17)

rev'd, *Washington v. Chrisman*, 455 U.S. 1 (1982), *on remand*, *State v. Chrisman*, 676 P.2d 419, 424 (1984) (state constitution violated by search and seizure).

A state court that continues to apply the same federal standard to examine state constitutional claims may feel compelled to reach the same result under the state constitution after a reversal on an issue of federal constitutional law. *See, e.g.*, *American Assoc. of State Univ. Professors v. Cent. State Univ.*, 699 N.E.2d 463 (Ohio 1998), *rev'd*, *Cent. State Univ. v. American Assoc. of State Univ. Professors*, 526 U.S. 124 (1999), *on remand*, *American Assoc. of State Univ. Professors v. Cent. State Univ.*, 717 N.E.2d 286, 291 (1999) ("This recent confusion concerning the federal standard of rational-basis review should not serve as support for its abandonment in Ohio. . . . Were we to modify this portion of the review . . . and impose greater judicial scrutiny on classifications under rational-basis review, every other step of the analysis would likewise be disturbed. We see no reason to create such a disturbance when the existing federal standard is workable and exceedingly well reasoned. We affirm, therefore, that the federal and Ohio Equal Protection Clauses are to be construed and analyzed identically.").

Failure to Follow the United States Supreme Court Mandate

By rejecting the several specific rational bases expressly found by the United States Supreme Court to support the differential tax rate under federal equal protection analysis, the Iowa Supreme Court violated this Court's mandate. The Iowa Supreme Court accepted the federal equal protection principles and then flat out

rejected the United States Supreme Court application of those principles as "illogical," "insufficient" and lacking support either "in the record" or in "common knowledge." *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 10-14. (App. 23-26) This conflict with the conclusions of the United States Supreme Court over application of federal principles transcends "a few unnecessary and unfortunate sentences" that the United States Supreme Court has recognized may be uttered on remand by "[j]udges who are reversed by a higher court" but "remain convinced that their original decision was correct." *Stanton v. Stanton*, 429 U.S. 501, 504 (1977) (Stevens, J., dissenting).

The Iowa Supreme Court's reliance on the Iowa Constitution to reach a contrary conclusion in this case is based on flawed legal reasoning. State courts cannot utilize the state constitution to reapply federal equal protection principles and reach an outcome contrary to that which has been reached by the United States Supreme Court in the same case without violating the federal mandate on remand. As Justice Cady in his dissent aptly pointed out:

> In this case, the Supreme Court found a rational basis *in the very same case before us, with the very same facts and reasons, as well as the same legal analysis*. In this light, it is difficult, if not impossible, to reconcile conflicting court opinions – one finding a reason for the classification to be rational and the other finding the reason to be totally arbitrary -- in an area where the legislature is given its broadest authority possible to make classifications.

Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald, 675 N.W.2d at 25 (Cady, J., dissenting) (emphasis added). (App. 65)

This Court has not hesitated to enforce its mandate when a state supreme court sidesteps its directives while addressing state law issues on remand. In *Stanton v. Stanton*, this Court found that a state statute which defined the age of majority for males and females differently for purposes of child support obligations violated the federal Equal Protection Clause[4] and remanded to the Utah Supreme Court to resolve the constitutional inequality as "an issue of state law." When on remand the Utah Supreme Court found that the only issue before them concerned the *female age of majority* and concluded that a female reaches the age of majority at eighteen – but did not otherwise address the discrepancy with respect to the male age of majority – the United States Supreme Court vacated the decision as "obviously . . . inconsistent with our opinion." *Stanton v. Stanton*, 421 U.S. 7 (1975), *on remand*, 552 P.2d 112 (1976), *vacated*, 429 U.S. 501 (1977), *on remand*, 564 P.2d 303 (Utah 1977). *See also Sumner v. Mata*, 455 U.S. 591 (1982) (decision vacated on certiorari for failure to comply with the mandate); *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (decision vacated on appeal for failure to comply with the mandate).

Express Disagreement Over Rational Bases

Abandoning any right to fashion its own state equal protection standard, the Iowa Supreme Court asserted its

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[4] The Utah statute at that time defined the age of majority for males at age twenty-one and for females at age eighteen. *Stanton v. Stanton*, 552 P.2d at 112, 113 (Utah 1976), *vacated*, 429 U.S. 501 (1977), *on remand*, 564 P.2d 303 (Utah 1977).

"obligation to evaluate independently the validity – under the *Iowa* Constitution – of the differential tax rates imposed on excursion boats and racetracks." *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 7. (App. 26) From this premise, the Court focused its discussion on the rational bases for the legislative classification, which the Court acknowledged had already been "found satisfactory by the Supreme Court." *Id.* at 9. (App. 31-32) These rational bases for the differential tax rates included: 1) encouraging economic development of river communities and promoting riverboat history; 2) protecting the reliance interests of established riverboat operators; and 3) aiding the financial position of the riverboats. *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 9. (App. 31-32)

On remand the Iowa Supreme Court limited its analysis to the three rational bases that had been specifically articulated in support of the differential tax rates in the opinion of the United States Supreme Court. Indeed, the Iowa Supreme Court makes little mention of additional rational bases that had been accepted by the Iowa district court or argued by the State before the courts.[5] Applying the same federal principles set forth in the

[5] The Iowa district court had posited three reasons for the tax classifications that would have met constitutional standards: promoting development of river communities; or promoting riverboat history; or promoting riverboat casinos as a useful industry. In addition the State argued that a tax preference for riverboats might also be supported by a legitimate state interest in preventing riverboats from leaving Iowa; or compensating riverboats for high operating expenses; or protecting the expectations of existing riverboat owners; or attracting new riverboats.

United States Supreme Court's opinion, the Iowa Supreme Court simply disagreed with this Court's conclusions.[6]

Economic Development of River Communities & Promotion of Riverboat History

Independently applying the federal equal protection principles, the Iowa Supreme Court announced bluntly that "[o]ur court does not accept the economic development of river communities and the promotion of riverboat history as a rational basis for the legislature's distinction between excursion boats and racetracks . . . So, to justify the differential tax treatment of these enterprises on the supposed connection of excursion boats to river communities and riverboat history and the absence of such a connection by racetracks is illogical." *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 9-10. (App. 32-33)

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[6] Discussing the possibility of a remand to the Iowa Supreme Court in oral argument, the United States Supreme Court did not anticipate that the Iowa Supreme Court would disagree with the United States Supreme Court on application of *federal law*. The United States Supreme Court commented that "the Iowa Supreme Court is free to do whatever it wants so long as not – as it's not inconsistent with our opinion." Later, in response to a statement by counsel summarizing the initial opinion of the Iowa Supreme Court, the United States Supreme Court observed that the Iowa Supreme Court "is entitled to view it that way from State law, but . . . they've said that State law mirrors Federal law, and just because they choose to look at it that way, doesn't mean I have to look at it that way." *Fitzgerald v. Racing Assoc. of Central Iowa, et al.*, 123 S.Ct. 2156 (2003) (Transcript of oral argument at 13-14, 42).

Reliance Interests of Riverboat Operators

Similarly, the Iowa Supreme Court found the federal analysis of a reliance interest by riverboat owners lacking as a rational basis for the tax differential:

> We also find insufficient the suggestion that excursion boat operators had a reliance interest on a lower tax rate so as to justify their different treatment. The taxation lines are not drawn on the basis of *when* the affected gambling establishments first invested in slot machines or in their business. Rather, the taxation lines are drawn on the basis of *where* the slot machines are located, regardless of the time of investment . . . the statute cannot be sustained on the basis of concerns that established businesses relied on the lower tax rates, because the differential tax is triggered not by whether the business engaged in gambling prior to the implementation of the new tax rates, but on whether the gambling takes place on a floating casino. Thus, this legislative purpose fails the rational basis test because the relationship of the classification to its goal is so attenuated as to render the distinction irrational.

Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald, 675 N.W.2d at 11-12 (emphasis in original). (App. 35-38)

Financial Aid to Riverboats

Apparently construing the United State Supreme Court opinion to imply that racetracks could afford a higher tax rate, the Iowa Supreme Court declared that it found "nothing in the record or in our common knowledge supporting a conclusion that the legislature could have rationally believed that racetracks would be significantly

more profitable than excursion boats . . . There is simply no rational connection between this conceivable legislative purpose and the discriminatory tax rate imposed on the racetracks." *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 14-15. (App. 41, 43)

The Iowa Supreme Court's application of the federal principles to reject the express conclusions of the United States Supreme Court is a clear violation of the federal mandate for further proceedings "not inconsistent with" the opinion of the United States Supreme Court.[7] The Iowa Supreme Court has twice declined to formulate a different standard for examining claims under the Equal Protection Clause of the Iowa Constitution. First, the Court announced that it applies "the same analysis" under the state and federal Equal Protection Clauses. *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 648 N.W.2d at 558. After reversal of the federal constitutional issue, on remand, the Court declined to formulate a different standard for examining claims under the Equal Protection Clause of the Iowa Constitution. *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675 N.W.2d at 5.

The Iowa Supreme Court chose to contradict the United States Supreme Court on the application of federal equal protection principles. In doing so, the majority of the Iowa Supreme Court "is taking a second bite at an apple that has long since dropped and rolled away from our tree." *Racing Ass'n of Cent. Iowa, et al. v. Fitzgerald*, 675

[7] The adjudication that several specific rational bases support the wagering tax differential is "law of the case" as to the application of federal equal protection principles. *See Arizona v. California*, 460 U.S. 605, 618-19 (1983).

N.W.2d at 27 (Cady, J., dissenting). (App. 69) The majority decision is "[n]ot only . . . intellectually inconsistent, but it's also offensive to the Supreme Court, its important role in the judicial system, and the principles of federalism on which our entire system operates." *Id.* at 28 (Cady, J., dissenting). (App. 69) "In the end, the majority decision nullifies the *unanimous* decision of the Supreme Court and effectively renders the Court's opinion in *Fitzgerald* advisory and no more." *Id.* at 28 (Cady, J., dissenting) (emphasis in original). (App. 66)

This violation of the mandate of the United States Supreme Court should not be allowed to stand.

CONCLUSION

For all of the foregoing reasons, the Petition for Certiorari should be granted and the decision of the Iowa Supreme Court should be summarily reversed by the United States Supreme Court with no further remand.

Respectfully submitted,

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decision of the Larue Circuit Court and direct that the evidence in this case that resulted from the illegal search and seizure of the Petitioner's house be suppressed.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

2003-SC-0134-D
(2002-CA-0004)

JERRY ALLEN RUNNINGEN - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - *Respondent*

LaRue Circuit Court
No. 2000-CR-0055

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED January 14, 2004.

/s/ Joseph E. Lambert
Chief Justice

APPENDIX B

RENDERED: DECEMBER 13, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2002-CA-000004-MR

JERRY ALLEN RUNNINGEN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Larue Circuit Court
Honorable Larry D. Raikes, Judge
Action No. 00-CR-00055

OPINION—AFFIRMING

BEFORE: EMBERTON, CHIEF JUDGE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Jerry Allen Runningen appeals from his conviction of trafficking in marijuana, complicity to possession of drug paraphernalia, and operating a motor vehicle under the influence, pursuant to a conditional guilty plea reserving the right to appeal the denial of a motion to suppress. Having concluded that the affidavit upon which the search warrant was based was sufficient to establish probable cause, we affirm.

On July 28, 2000, Trooper Jeremy Thompson of the Kentucky State Police submitted an affidavit for a search warrant for appellant's home at 2327 Wunderland Road which provided, in relevant part:

> On the 27 day of July 2000, at approximately 1900 [] p.m. affiant received information from/observed: On

> June 24, 2000 this officer met with persons he knew to be reliable, Jones and Underwood who stated that Runningen on Wunderland Rd. was growing marijuana. They also provided this officer with a list of names they believed to be trafficking marijuana and other controlled substances. On June 30, 2000 this officer arrested two of the subjects on the list provided to him by Jones and Underwood for four separate felony counts of possession of narcotics. On July 27, 2000 this officer listened to an anonymous caller that called Post 4, E-town, KSP, to report that Dennis Asbell was at 2327 Wunderland Rd., at a Jerry Runningen residence purchasing marijuana. This officer was given vehicle information as well as a destination of Asbell. Asbell was stopped pulling from Wunderland Rd. and arrested for possession of marijuana.
>
> Acting on the information received, affiant conducted the following independent investigation: Jerry Runningen resides at 2327 Wunderland Rd. Upton, Ky 42784. This was corroborated by a [sic] operators license check. Jerry Runningen has a 1949 Harley Davidson, black, and a 1981 Honda 4-dr, grey that are registered to him. This was corroborated by a vehicle check. Jerry Runningen has no criminal history pertaining to controlled substances or marijuana trafficking/possession.

Based upon the affidavit, the court issued a search warrant for appellant's residence. While police officers were executing the search warrant, appellant pulled up on a motorcycle. Pursuant to the search warrant, the officers searched appellant's residence and seized marijuana, drug paraphernalia, and a handgun.

Thereafter, on September 18, 2000, appellant was indicted for trafficking in marijuana, complicity to commit trafficking in marijuana, possession of handgun while committing offense, complicity to commit possession of handgun while committing offense, possession of drug paraphernalia, complicity to commit possession of drug paraphernalia, and operating a motor vehicle while under the influence of alcohol.

Appellant moved to suppress the evidence seized pursuant to the search warrant, and a suppression hearing was held on April 2, 2001. Appellant argued that the search warrant was based on an affidavit that was facially insufficient, on grounds including the fact that the stop of Asbell described in the affidavit was later determined to have been illegal.[1]

In an order dated August 11, 2001, and entered August 14, 2001, the trial court denied the motion to suppress. On August 24, 2001, appellant filed a motion to vacate, alter or amend the August 14, 2001, order, and/or make specific findings of fact on various issues. In an order dated September 25, 2001, and entered on September 27, 2001, the court denied appellant's motion, making the following additional findings:

> (1) The Court does not believe or find that the dismissal of the charges against Asbell on constitutional grounds negates consideration of the facts emanating from his visit to the Runningens, including the possession of marijuana, for purposes of issuance of a search warrant. In other words, although Asbell had standing to contest the evidence obtained from him, the Runningens possessed no such standing to object to such evidence within the context of the search warrant affidavit involved herein.
>
> (2) Had the information relating to Asbell's visit to the Runningens and his possession of marijuana shortly after leaving their home not been available to the Court it probably would have found the search warrant affidavit facially deficient.

Subsequently, on October 5, 2001, appellant entered a conditional guilty plea to trafficking in marijuana over eight

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[1] The stop of Asbell occurred in Hardin County. On February 1, 2001, the Hardin District Court entered an order finding that the Commonwealth did not have probable cause to stop Asbell, and therefore suppressed the evidence obtained as a result of the stop.

ounces, complicity to possession of drug paraphernalia, and operating a motor vehicle under the influence, reserving the right to appeal the trial court's denial of his motion to suppress. Appellant was sentenced to a total concurrent sentence of three years' imprisonment. This appeal followed.

We first address appellant's argument as to whether he has standing to object to the use of the evidence obtained pursuant to the illegal stop of Asbell in the affidavit for the search warrant for appellant's residence. Appellant contends that because the stop of Asbell was illegal, that anything flowing from the stop should be suppressed as "fruits of the poisonous tree," and thus, the information relating to the stop of Asbell should not be considered in the affidavit. Although both appellant and the trial court framed the issue in terms of whether appellant had "standing" to object to the use of the Asbell evidence in the context of the affidavit, in Commonwealth v. Bertram, Ky. App., 596 S.W.2d 379, 381 (1980), we stated:

> The United States Supreme Court seems to have discarded the whole concept of "standing" to contest a search and seizure in favor of an inquiry into "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Rakas v. Illinois, 439 U.S. 128, 140, 99 S. Ct. 421, 429, 58 L. Ed. 2d 387 (1978). Put another way, the appropriate inquiry seems to be whether the defendant had an interest in connection with the searched premises that gave rise on his part to a reasonable expectation of freedom from governmental intrusion. [citations omitted.]

" 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' " Rakas, 439 U.S. at 133, 99 S. Ct. at 425, quoting Alderman v. United States, 394 U.S. 165, 174, 89 S. Ct. 961, 966-967, 22 L. Ed. 2d 176 (1969).

> A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amend-

> ment rights infringed. Alderman, [] 394 U.S. [] at 174, 89 S. Ct. [1 at 966. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 619, 38 L. Ed. 2d 561 (1974), it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. [footnote omitted.)

Rakas, 439 U.S. at 134, 99 S. Ct. at 425. Accordingly, as the illegal stop of Asbell did not infringe upon appellant's Fourth Amendment rights, appellant cannot invoke the exclusionary rule with regard to evidence obtained from the stop of Asbell. Id; Bertram, 596 S.W.2d at 381.

Appellant further argues that, either with or without the Asbell evidence being considered, that the affidavit supporting the search warrant was facially defective. In addition to the use of the Asbell evidence, appellant contends that the affidavit was facially invalid on grounds including that it did not identify the location where appellant was growing marijuana and therefore did not establish the place to be searched with certainty; that the Jones and Underwood information was stale and was not evidence that appellant was growing marijuana; and that the affidavit contained an untrue statement that "Asbell was stopped pulling from Wunderland Rd." when he was actually stopped three-and-a-half miles from Wunderland Road.

The affidavit provided that "Runnigen on Wunderland Rd. was growing marijuana" and that Asbell was at appellant's residence at 2327 Wunderland Rd. purchasing marijuana. Hence, we conclude that the affidavit "reasonably describe[d] the property or premises to be searched." Coker v. Commonwealth, Ky. App., 811 S.W.2d 8, 9 (1991). As to appellant's assertion that the information provided by Jones and Underwood was stale, we believe that time, for the purposes of staleness, is relative to the charge. In the present case, we conclude that the Jones and Underwood information, which was approximately one month old at the time of the issuance of the search warrant, was not stale as

related to marijuana growing. Further, with regard to the Jones and Underwood information, we note that an affidavit for a search warrant based on information provided by a named individual is generally sufficient to support the warrant. Embry v. Commonwealth, Ky., 492 S.W.2d 929, 931 (1973); Edwards v. Commonwealth, Ky., 573 S.W.2d 640, 641 (1978). As to the statement that "Asbell was stopped pulling from Wunderland Road," we conclude that while this statement may not have been artfully worded, it was not false or misleading. See Commonwealth v. Smith, Ky. App., 898 S.W.2d 496, 503 (1995). While Asbell was actually stopped a few miles down the road on U.S. 31, Officer Thompson had initially observed him pulling from Wunderland Road. Accordingly, and in light of our conclusion that the Asbell evidence may be considered with regard to appellant, we consider the affidavit in its entirety.

In Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984), the Kentucky Supreme Court adopted the "totality of the circumstances" test for determining probable cause set forth by the United States Supreme Court in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The magistrate must make a:

> "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. [citation omitted)."

Beemer, 665 S.W.2d at 914-915, quoting Gates, 462 U.S. at 238-239, 103 S. Ct. at 2332. In the present case, under the totality of the circumstances we conclude that the affidavit established a substantial basis for a finding that probable cause existed. Beemer, 665 S.W.2d at 914-915. Accordingly, the trial court did not err in denying appellant's motion to suppress.

For the aforementioned reasons, the judgment of the Larue Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
Dwight Preston
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:
Albert B. Chandler, III
Attorney General
Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky

APPENDIX C

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2002-CA-000004

JERRY ALLEN RUNNINGEN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Larue Circuit Court
Action No. 00-CR-00055

ORDER—DENYING PETITION FOR REHEARING
—Entered: January 22, 2003

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND SCHRODER, JUDGES.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

Entered: January 22, 2003

/s/ Rick h. Johnson
Judge, Court of Appeals

APPENDIX D
LARUE CIRCUIT COURT

Case Nos. 00-CR-00055
and 00-CR-00056

COMMONWEALTH OF KENTUCKY, - - *Plaintiff,*

v.

JERRY ALLEN RUNNINGEN and
ROBERTA DALE RUNNINGEN, - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER—Entered: August 14, 2001

The Defendants are husband and wife. At all times relevant herein, they lived on property owned by them located at 2327 Wunderland Road, Upton, LaRue County, Kentucky. Each stands indicted on various counts, resulting from evidence seized by the police from their home under a search warrant issued July 28, 2000, by LaRue County District Judge, James E. Bondurant.

The Defendants filed motions to suppress the fruits of that search, alleging the search warrant was unreasonabley due to its supporting affidavit being facially defective. The pertinent portions of the affidavit, signed by State Police Trooper Jeremy Thompson, read as follows:

> On the 27th day of July, 2000, at approximately 1900 p.m. affiant received information/observed: On June 24, 2000 this officer met with persons he knew to be reliable, Jones and Underwood who stated that Runningen on Wunderland Rd. was growing marijuana. They also provided this officer with a list of names they believed to be trafficking marijuana and other controlled substances. On June 30, 2000 this officer arrested two of the subjects on the list provided to him by Jones and Underwood for four separate

> felony counts of possession of narcotics. On July 27, 2000 this officer listened to an anonymous caller that called Post 4, E-town, KSP, to report that Dennis Asbell was at 2327 Wunderland Rd., at a Jerry Runningen residence purchasing marijuana. This Officer was given vehicle information as well as a destination of Asbell. Asbell was stopped pulling from Wunderland Rd. and arrested for possession of marijuana.

Trooper Thompson further included in his affidavit that he had verified through an operator's license check that Jerry Runningen did, in fact, reside at the 2327 Wunderland Road address.

A hearing was conducted upon the Defendants' suppression motions on April 2, 2001, followed by a briefing schedule. All briefs have been filed and the matter stands submitted for adjudication of said motions.

The Defendants attempt to dissect the above quoted portions of the affidavit to show that the affidavit was defective. First, they note that the information received from Underwood and Jones concerning the alleged activities of June 24, 2000 was stale and did not state where the alleged marijuana growing was located. They further contend that the information about a list of drug traffickers and the fact that a couple of them had been arrested on narcotic charges had nothing to do with whether the Runningens were growing marijuana. Lastly, they posit that the information about Asbell being arrested for possession of marijuana should not be considered because it was subsequently suppressed through a Hardin County District Judge's ruling that there was no probable cause to support the stopping of Asbell (Asbell was stopped and arrested in Hardin County). A copy of the Hardin county judge's ruling was introduced into evidence at the hearing as Defendants' Joint Exhibit # 1.

The standard of review for the issuance of a search warrant requires a reviewing court to examine whether the issuing judge had a substantial basis for concluding that the affidavit in support of the warrant established probable cause. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76

L.Ed.2d 527 (1983); Beemer v. Commonwealth, Ky., 665 S.W.2d 912 (1984). In making such determination, the court must determine if, from the totality of the circumstances as set forth in the affidavit, the issuing magistrate had sufficient information before him to indicate ". . . a fair probability that contraband or evidence of a crime will be found in a particular place . . ." Illinois v. Gates, supra.

In assessing the actions of the issuing magistrate, it is necessary to read the affidavit as a whole, not sentence by separate sentence. Thus, what was available to Judge Bondurant as he read Trooper Thompson's affidavit? He was apprised of the fact that reliable informants, known to the trooper, had earlier reported to the trooper that they had information that a Runningen on Wunderland Road was growing marijuana; he knew that these informants had given the trooper a list of individuals allegedly involved in narcotics activity; he knew that Trooper Thompson had arrested two of the individuals on the list for drug related felonies, giving credibility to the information provided by the informants, Jones and Underwood; and, he knew that Asbell had been arrested for possession of marijuana following his visit to the residence of Jerry Runningen located at 2327 Wunderland Road (Asbell admitted being at the Runningens' residence on the date set out in the search warrant, although denying purchase of any marijuana).

Judge Bondurant, on the date he signed the search warrant, could not know that the charges against Asbell would be dismissed due to a finding of lack of probable cause to stop him by Trooper Thompson. And, as for as the affidavit is concerned, such subsequent disposition of Asbell's case does not negate the fact that marijuana was found in his possession immediately following his visit to the Runningens' home on July 27, 2000.

In summary, the Court finds that when Judge Bondurant reviewed the affidavit, there existed, from a totality of the circumstances set forth in Trooper Thompson's affidavit, sufficient information to indicate there was a fair probability that marijuana was present upon the Runningens' premises.

Since the affidavit was proper on its face, the only way it could be rejected would be upon a showing that it contained intentionally or recklessly false statements, and that, if purged of such false statements, it would not support a finding of probable cause. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). This Court finds no evidence of any recklessly or intentionally false information set forth in the subject affidavit.

Now, therefore, the premises considered, it is ORDERED that the motions of Defendants to suppress the evidence seized under the search warrant of July 28, 2000, be and they are hereby denied.

This is an interlocutory order.

Dated August 11, 2001.

/s/ Larry D. Raikes
Judge, Larue Circuit Court

Distribution List:
Charles C. Simms, III
Dwight Preston
Roger Rigney

Entered: August 14, 2001

/s/ Larry C. Bell
LaRue Circuit Clerk

APPENDIX E
LARUE CIRCUIT COURT

Case Nos. 00-CR-00055
and 00-CR-00056

COMMONWEALTH OF KENTUCKY, - - *Plaintiff,*

v.

JERRY ALLEN RUNNINGEN and
ROBERTA DALE RUNNINGEN, - - - *Defendants.*

ORDER--Entered: September 27, 2001

These cases stand submitted upon the Defendants' motion to alter, amend or vacate the Court's Findings of Fact, Conclusions of Law and Order, entered herein on August 14, 2001, and/or to make specific findings of fact on various issues, and to clarify certain issues.

After a review of the pending motions, the Court finds no compelling reason to alter, amend or vacate its Order of August 14, 2001. However, it will make certain additional findings and points of clarification concerning same.

(1) The Court does not believe or find that the dismissal of the charges against Asbell on constitutional grounds negates consideration of the facts emanating from his visit to the Runningens, including the possession of marijuana, for purposes of issuance of a search warrant. In other words, although Asbell had standing to contest the evidence obtained from him, the Runningens possessed no such standing to object to such evidence within the context of the search warrant affidavit involved herein.

(2) Had the information relating to Asbell's visit to the Runningens and his possessioan of marijuana shortly after leaving their home not been available to the Court it probably would have found the search warrant affidavit facially deficient.

Now, therefore, the premises considered, it is Ordered that the Defendants' motion to alter, amend or vacate be and it is hereby overruled.

Dated September 25, 2001.

/s/ Larry D. Raikes
Judge, Larue Circuit Court

Distribution List:
Charles C. Simms, III
Dwight Preston
Roger Rigney

Entered: September 27, 2001

/s/ Larry C. Bell
LaRue Circuit Clerk

APPENDIX F

AFFIDAVIT FOR SEARCH WARRANT

AOC-335
3-88
Commonwealth of Kentucky
Court of Justice
Ky. Const. § 10; RCr 13.10

Case No. 00-F-00066
District Court
Larue County

The affiant, Trooper Jeremy Thompson, a peace officer of the Kentucky State Police, being first duly sworn, states that he has and there is reasonable and probable ground to believe and affiant does believe that there is now on the premises known and numbered as:

2327 Wunderland Rd.
Upton, KY 42784

and more particularly described as follows: from 31E and KY 84 in the Hodgenville City Limits, go we on KY 84 8.8 miles, turn south on US 31W, go 1.3 miles, turn left on Murrelltown Rd., immediately turn right on Jenkins rd., go 2.4 miles on Jenkins Rd., Turn right on Wunderland Rd., go 3/10 mile and 2327 is on the right. A two story dwelling w/ detached garage and/or in a vehicle or vehicles described as: any vehicle registered to Jerry Runnigen, or any vehicles present at the residence, or any vehicle that arrives at the residence at the time this search warrant is executed.

and/or on the person or persons of: Jerry Runningen, or any other persons at the residence, or who arrive at the residence at the time of the execution of this search warrant.

the following described personal property, to wit: To search for evidence related to the offenses of Trafficking in a controlled substance, and possession of a controlled substance, or Cultivation of Maijuana. To wit: Marijuana. To search for marijuana, or items or materials that are frequently used to package marijuana, to include but not limited to plastic sandwich bags, small plastic envelopes, and twist ties. To search for devices used to weigh marijuana either electronic or manual. To search for records either written or electronic, to include papers, cell phones, pagers, call identification devices, computers, disc/tapes for computers that shows those involved in the cultivation or distribution of marijuana. To search for monies obtained from the sale of marijuana, records written or electronic that shows where monies are obtained and from how monies are expended and secreted. To search for items or devices that are used to ingest marijuana into the human body, but not limited to pipes rolling papers and bongs. To search for items used to cultivate marijuana such as potting soil, high-intensity grow lamps, rockwool, Miracle Gro containers, transformers, or other materials used to cultivate marijuana

Affiant states that there is probable and reasonable cause to believe and affiant does believe that said property constitutes:

- ✓ stolen or embezzled property;
- ✓ property of things used as the means of committing a crime;
- ✓ property or things in the possession of a person who intends to use it as a means of committing a crime;
- ✓ property or things in the possession of a person to whom it was delivered for the purpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime;
- ✓ property or things consisting of evidence which tends to show that a crime has been committed or that a particular person has committed a crime;

Affiant has been an officer in the aforementioned agency for a period of 2 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 27th day of July, 2000, at approximately 1900 p.m. affiant received information from/observed: On June 24, 2000 this officer met with persons he knew to be reliable, Jones and Underwood who stated that Runningen on Wunderland Rd. was growing marijuana They also provided this officer with a list of names they believed to be trafficking marijuana and other controlled substances. On June 30, 2000 this officer arrested two of the subjects on the list provided to him by Jones and Underwood for four separate felony counts of possession of narcotics. On July 27, 2000 this officer listened to an anonymous caller that called Post 4, E-town, KSP, to report that Dennis Asbell was at 2327 Wunderland Rd., at a Jerry Runningen residence purchasing marijuana. This officer was given vehicle information as well as a destination of Asbell. Asbell was stopped pulling from Wunderland Rd. and arrested for possession of marijuana.

Acting on the information received, affiant conducted the following independent investigation: **Jerry Runningen resides at 2327 Wunderland Rd. Upton, Ky 42784. This was-corroborated by a operators license check. Jerry Runningen has a 1949 Harley Davidson, black, and a 1981 Honda 4-dr, grey that are registered to him. This was corroborated by a vehicle check. Jerry Runningen has no criminal history pertaining to controlled substances or marijuana trafficking/possession.**

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a Search Warrant, based on the aforementioned facts, information and circumstances and prays that a Search Warrant be issued, that the property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.

/s/ Trooper Jeremy Thompson
Trooper Jeremy Thompson

Subscribed and sworn to before me on this the 28th day of July, 2000, 1930 p.m.

/s/ James E. Bondurant
District Judge
LaRue District Court

APPENDIX G

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

ELIZABETHTOWN DIVISION

No. 00-M-02474

COMMONWEALTH OF KENTUCKY, - - *Plaintiff,*

v.

DENNIS R. ASBELL, - - - - - - - *Defendant.*

ORDER—Entered: February 1, 2001

The parties appeared before this court on September 13, 2000 for a suppression hearing. The case was taken under submission at that time. However, the file was not transmitted to the Judges office for a ruling. As a result of this courts investigation into DUI cases over 90 days old this case was found in the clerks office on January 25, 2001.

The sole issue before the court iswhether or not the officer had probable cause to initiate a traffic stop of a motorcycle traveling 40 mph in a 55 mph zone on Sportsmans Lake Road at night for a violation of KRS 189.390(6). (Driving too slow for conditions) No request by the Commonwealth was made to continue the suppression hearing and once a suppression motion is made the Commonwealth has a burden to justify its actions.

KRS 189:390(6) states "a person shall not drive at a speed that will impede or block . . . traffic. Sportsmans Lake Road is a 2 lane county maintained road. The defendant was operating a motorcycle at night, well after dark. Since the officer did not testify the court can only assume that the only reason for the stop was driving 40 mph in a 55 mph zone.

With only that information the court finds that the Commonwealth did not have probable cause to initiate the traf-

fic stop for a violation of KRS 189.390(6). As a result of the illegal stop the evidence obtained as a result of the stop is suppressed.

This case shall be set for February 28, 2001 for disposition in Elizabethtown District Court at 9:30 a.m.

This 1st day of February, 2001.

/s/ John David Simcoe
John David Simcoe
Judge, Hardin District Court

Entered: February 1, 2001